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No. 90-564

In The

Supreme Court of the United States

October Term, 1990

HARRY MORGAN,

Petitioner,

v.

ANR FREIGHT SYSTEM, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent ANR Freight System, Inc. respectfully submits that the opinion and judgment of the United States Court of Appeals for the Tenth Circuit do not present any of the questions alleged in the Petition or any other questions which would warrant review by this Court.

RULE 29.1 STATEMENT

Respondent ANR Freight System, Inc. is a wholly owned subsidiary of its parent company, The Coastal Corporation. Respondent ANR Freight System, Inc. has no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

Supreme Court Rule 15.1 provides that a brief in opposition to a petition for a writ of certiorari "should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Throughout the course of this litigation before the district court, the court of appeals, and now this Court, Petitioner Harry Morgan ("Morgan") has persistently asserted as "fact" certain propositions

which are not supported by the record. After reviewing that record, both the district court and the court of appeals agreed with Respondent ANR Freight System, Inc. ("ANR") that Morgan failed to raise a triable issue of age discrimination. Nevertheless, Morgan persists in misrepresenting the record before this Court; therefore, ANR offers the following statement of the case which is substantially identical to the statement of the case presented to, and accepted as accurate by, the Tenth Circuit. *See* Petitioner's Appendix at B-2 to B-5.

ANR is a national general commodity freight trucking company which was constituted from three smaller carriers: Graves Truck Line, Inc., Associated Truck Lines, Inc., and Garrett Freightlines, Inc. Like most other general commodity freight carriers, ANR was substantially impacted by deregulation of the trucking industry and increasing labor, fuel and equipment costs. These factors combined to result in record operating losses for ANR in 1985; the net operating loss for that year was $7,655,523. Management's response to these figures included, among other things, a reduction in the salaried work force. Thus in February, 1986, regional operations managers and sales managers were directed to carefully examine their regions and identify salaried positions that could be eliminated without significantly affecting ANR's ability to provide service to its customers. Seventy-eight salaried positions were eliminated nationwide as a result of this process.

In the Kansas City Region, thirteen positions were eliminated. Decisions regarding the positions to be eliminated in the Kansas City Region were made by Steve Emahiser, the Regional Operations Manager, and Cam

Hill, the Regional Sales Manager. In making these decisions, Emahiser and Hill (with the recommendations of his district sales managers) reviewed their respective areas of responsibility and identified those positions they felt were most expendable, such that their elimination would least impact the ability to render customer services. Hill relied upon input from his district sales managers, including Frank Hollingshead, whose district included the Iola/Fort Scott territory in Kansas. The jobs eliminated in the Kansas City Region included four terminal manager positions in smaller outlying terminals, four territory sales managers, three dispatchers, a secretary and a cashier. As of February 21, 1986, the date these positions were eliminated, the persons in those positions ranged in age from 27 to 57.

Among the salaried positions eliminated in the Kansas City Region were two of the three at the Iola, Kansas terminal – the terminal manager's position held by Harry Morgan, then age 57, and the territory sales manager position held by Scott Mann, then age 49. The only position unaffected was that of terminal secretary. The Iola terminal was selected for reduction because of the declining economy in that part of Kansas which resulted in a decline in the activity at the Iola terminal and because it was felt that the sales and operations duties performed by Morgan and Mann could be handled by the terminal manager at Cherryvale, Kansas, Jerry Near, age 52.

Morgan and Mann were respectively advised of their terminations on February 21, 1986 by Emahiser, who was Morgan's direct superior, and Frank Hollingshead, District Sales Manager, who was Mann's immediate superior. Emahiser told Morgan that he was being terminated due

to the economic conditions of the company. Hollingshead made essentially the same statement to Mann. Morgan felt that Emahiser's conduct at the time of his termination was professional, and Morgan had no reason to disbelieve the reason for the termination given by Emahiser. He did not feel bitter towards ANR at the time of his termination because he was aware of the poor economic conditions in southeast Kansas.

Neither Emahiser nor anyone else at ANR told Morgan that he would be considered for any future vacancies with ANR. ANR's practice is not to rehire former employees except in rare circumstances and then only upon approval by the president of the company. Thus, Morgan had no real expectation of reemployment with ANR after February 21, 1986.

Sometime after Morgan and Mann were terminated, it became apparent to Hill that Near could not handle both the operational and sales aspects of the Cherryvale terminal and the Iola/Fort Scott area. Accordingly, Hill decided to reestablish the territorial sales manager position at Iola and sought and received permission to do so. He rehired Mann for that position on April 14, 1986. Morgan's position of terminal manager was never reestablished.

It was not until Morgan learned of Mann's rehire that he became upset with his termination. He was upset because he felt he should have had Mann's position solely by virtue of his length of service with the company. Once he learned of Mann's rehire, he filed complaints and charges of employment discrimination with the Kansas Commission on Civil Rights and the EEOC alleging

both handicap discrimination because of chronic stomach problems and age discrimination.

Morgan then filed this action. Following extensive discovery, the district court granted ANR's motion for summary judgment (and denied Morgan's cross motion for summary judgment on liability) on January 10, 1989. Petitioner's Appendix at A-1. The Tenth Circuit affirmed the judgment in an opinion filed April 20, 1990. *Id.* at B-1.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because Morgan raises no issue warranting review under the considerations governing review on writ of certiorari set forth in Supreme Court Rule 10. First, there is no conflict between the Tenth Circuit's decision in this case and this Court's decisions in *Lytle v. Household Manufacturing, Inc.*, 110 S. Ct. 1331 (U.S. 1990), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), because summary judgment was entered here not because of collateral estoppel based on equitable findings but rather because Morgan failed to present evidence sufficient to withstand a motion for summary judgment. Second, Morgan admits that the Tenth Circuit's formulation of a prima facie case of age discrimination is consistent with that of other circuits, and Morgan is merely attempting to reargue the evidence in this particular case even though both the court of appeals and district court concluded that Morgan's purported evidence of discrimination either is unsupported by the record or fails to support the inference claimed by Morgan. Finally, the Tenth Circuit's

application of the Age Discrimination in Employment Act in the context of a reduction in force is consistent with the law in various circuits that a person is not entitled to preferential treatment based on age.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Between The Tenth Circuit's Decision And This Court's Decisions In *Lytle v. Household Manufacturing, Inc.*, 110 S. Ct. 1331 (U.S. 1990), And *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Morgan first asserts that certiorari should be granted because the entry of summary judgment deprived him of his right to a jury trial contrary to the decisions in *Lytle v. Household Manufacturing, Inc.*, 110 S. Ct. 1331 (U.S. 1990), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Morgan's attempt to convert the entry of summary judgment into a deprivation of constitutional rights is misguided.

In *Lytle*, the Court held that the Seventh Amendment prohibits according collateral estoppel effect to findings made by a district court on equitable claims where those claims had proceeded to trial first solely as the result of a legal error committed by the trial court. Morgan's case in no way resembles *Lytle* because summary judgment occurred not because of collateral estoppel based on equitable findings but rather because Morgan failed to present evidence sufficient to withstand a motion for summary judgment.

In essence, Morgan's first point is that summary judgment was erroneous because he was denied a jury trial. To the contrary, a ruling otherwise proper does not become erroneous merely because it has the incidental effect of precluding or terminating a jury trial. *See, e.g., Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902) (summary judgment does not violate the Seventh Amendment); *Galloway v. United States*, 319 U.S. 372, 388-93 (1943) (directed verdict does not violate the Seventh Amendment).

Morgan's reliance on *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), is likewise misplaced. Morgan asserts the Tenth Circuit erroneously weighed the evidence and made credibility determinations; however, a review of the Tenth Circuit's opinion belies this contention. The Tenth Circuit was fully cognizant of the legal standards governing summary judgment and specifically cited *Anderson*. Petitioner's Appendix at B-8. Although Morgan asserts that he was entitled to have the evidence viewed in the light most favorable to him, the actual standard is that the non-movant is entitled to "all *justifiable* inferences." *Anderson*, 477 U.S. at 255 (emphasis added). This standard was also examined in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), where the Court held that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.*

Summary judgment is often appropriate in actions brought under the Age Discrimination in Employment

Act ("ADEA"), 29 U.S.C. § 621, *et seq. Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1459 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). In an ADEA case, a plaintiff must present more than conjecture and mere assertions of discriminatory motive and intent to raise a genuine issue of material fact. *Branson v. Price River Coal Co.*, 853 F.2d 768, 771-72 (10th Cir. 1988). The plaintiff is responsible for identifying actions by the defendant that, if unexplained, give rise to an inference of discrimination. *Foster*, 772 F.2d at 1459 (citing *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977)). The court then has the task of determining "whether the plaintiff has produced evidence sufficient to support a reasonable inference of the existence of the fact at issue." *Id.*, 772 F.2d at 1459.

Morgan failed to present evidence raising a triable issue of age discrimination, and the Tenth Circuit acted properly in affirming summary judgment. In reality, Morgan complains because the Tenth Circuit scrutinized the record rather than accepting Morgan's distortions of the record at face value. Two courts have already undertaken the task of reviewing the record and both have concluded that Morgan failed to adduce evidence sufficient to take the case to a jury. *See Burnette v. Dow Chemical Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988) (appellate court considering challenge to entry of summary judgment reviews the record according to the same standard applied by the district court to determine whether a genuine issue of material fact exists); *Foster*, 772 F.2d at 1459 (appellate court reviews record de novo). It would be a tremendous waste of this Court's scarce resources to undertake the

task of reviewing the record a third time. Thus, Morgan's first point fails to present an appropriate basis for the discretionary issuance of a writ of certiorari under Supreme Court Rule 10.

II. The Tenth Circuit Reviewed The Record And Correctly Determined That Morgan Failed To Produce Evidence Sufficient To Raise A Triable Inference Of Age Discrimination.

For his second argument in support of granting the writ, Morgan asserts the Tenth Circuit erred in concluding that he failed to produce evidence sufficient to establish a prima facie case of age discrimination. Although Morgan attempts to frame this issue as involving a conflict among the circuits, Morgan's real complaint concerns how the law was applied to the particular facts established in the record of this case. This is not a situation where the Tenth Circuit has adopted a rule of law contrary to that found in other circuits; indeed, Morgan admits that the Tenth Circuit's statement of the elements of a prima facie case of age discrimination in *Branson v. Price River Coal Co.*, 853 F.2d 768, 770 (10th Cir. 1988), "is consistent with that of other circuits." Petition at 18. Thus, Morgan's second point amounts to nothing more than reargument of the facts, which is not a matter warranting the issuance of a writ of certiorari.

The "evidence" which Morgan claims raised an inference of discrimination was scrutinized by the Tenth Circuit and found to be lacking for reasons explained in its opinion. Petitioner's Appendix at B-8 to B-27. Generally stated, Morgan's purported evidence of discrimination either is unsupported by the record or fails to support the

inference claimed by Morgan, as illustrated by the following examples.

First, Morgan repeatedly asserts that he was replaced by a younger employee, Scott Mann (age 49), and that "Mann performed the exact same duties and responsibilities that Morgan had previously performed prior to his layoff." Petition at 7. The Tenth Circuit reviewed the record and rejected this contention:

> Morgan contends, *without factual support*, that Mann assumed the job responsibilities of Morgan following his recall. Mann gave deposition testimony that although he performed some operational duties as the only salaried employee at the Iola terminal, he did not perform the duties formerly performed by Morgan while Morgan was the terminal manager. Further, Mann testified that his duties have not really been expanded from those he performed before his termination.

Petitioner's Appendix at B-20 (emphasis added; citation omitted). In reality, what remained of Morgan's job duties were transferred to Near, age 52, at the Cherryvale terminal; however, this slight age difference (57 versus 52) raises no substantial inference of discrimination. *EEOC v. Sperry Corp.*, 852 F.2d 503, 510 (10th Cir. 1988).

Second, Morgan makes various assertions that ANR retained younger and less qualified persons in the Kansas City Region and elsewhere and that the reduction in force disproportionately affected older ANR employees. In essence, Morgan attempted to establish a prima facie case by arguing that ANR retained someone somewhere in a position for which he was qualified. Apart from Morgan's arguments with respect to Mann, he never focused on any

other particular employee and made no effort to show that such other employee was similarly situated or was retained in a position to which Morgan had some claim or entitlement. Morgan's assertion that older employees were disproportionately affected by the reduction in force is also an abstraction not supported by the record. As of February 21, 1986, the date thirteen positions were eliminated in the Kansas City Region, the persons in those positions ranged in age from 27 to 57, and only seven of the thirteen were within the protected age group. Nothing in this evidence raises a reasonable inference that age was a factor in the employment action.

Third, Morgan argues that since February 21, 1986 ANR has rehired persons with less experience in the trucking industry and with ANR. Because Morgan admitted that he never applied for any of these positions, this argument presupposes a right of recall without the need for an application; hence, Morgan maintains contrary to the evidence that he was laid off rather than terminated. Morgan made a judicial admission in his complaint that he was "terminated", and he also admitted that ANR made no representations to him about consideration for future openings. Once again, the Tenth Circuit reviewed the record and correctly concluded that the record failed to substantiate Morgan's assertion. Petitioner's Appendix at B-24.

Finally, Morgan relies on an assortment of other evidence which he claims raises an inference of discrimination. For instance, Morgan claims that evidence of other ADEA lawsuits against ANR raises an inference of discrimination, but as the Tenth Circuit correctly noted, this evidence proves nothing. Petitioner's Appendix at B-17 to

B-18. Equally immaterial is Morgan's evidence that he had been employed for a long period of time and had trained and supervised other employees, including Mann. Morgan's reliance on such evidence is indicative of Morgan's erroneous notion that ADEA confers preferential rights on older workers.

III. The Tenth Circuit Correctly Applied The Rule Of Law That The Age Discrimination In Employment Act Does Not Require An Employer To Grant Preferential Treatment To Employees Within The Protected Age Group.

For his final argument, Morgan again asserts that the Tenth Circuit's decision somehow in is conflict with decisions in other circuits involving age discrimination claims in the context of a reduction in force. Once again, the legal conclusion drawn by Morgan is dependent upon factual assertions unsupported or contradicted by the record, most notably Morgan's erroneous assertions that ANR offered no reason for his termination other than general economic conditions and that reduction in salary costs was ANR's sole criterion for eliminating positions. In reality, Morgan complains because the Tenth Circuit held in accordance with cases from various circuits that Morgan was not entitled to preferential treatment because of his age.

Morgan first attempts to deny the existence of adverse economic conditions, arguing that the affidavit submitted by ANR to establish its net operating loss of $7.6 million in 1985 is somehow insufficient because it lacked "supporting documentation." Petition at 25. This affidavit stood uncontroverted, and Morgan's attempt to

disregard the affidavit is contrary to established procedures under Fed. R. Civ. P. 56(e). Moreover, Morgan's own deposition testimony outlines the difficulties ANR was experiencing as a result of deregulation and the economy in southeast Kansas. In the Iola terminal where Morgan was employed as the terminal manager, the drivers were decreased from seven to two and one "ten-percent" man starting in 1982 because, as Morgan testified, "that was the year that we started going, you might say, going down because of deregulation and economy, down in southeast Kansas." Morgan added that deregulation caused the decline in the fortunes of a number of general commodity companies, including ANR, and made it difficult to turn a profit. Another result of deregulation was increased competition. In 1984 to 1985, approximately fourteen or fifteen additional general commodity truck lines – not including new private carriers – entered the Fort Scott/Iola area where the number of lines was previously limited to three. Compounding the problem, customers had reduced the amount of inventory they carried thus reducing the size of shipments.

Morgan next argues, contrary to the record, that ANR articulated no reason for his termination other than generalized economic conditions and that ANR made termination decisions based solely on the salary costs to be saved. In reality, ANR established that the reduction in force was implemented by determining which salaried positions could be eliminated without adversely affecting customer service or revenue. Morgan's argument consistently confuses the *goal* of the reduction in force (to reduce operating expenses and salary costs) with the *criterion* used in implementing the reduction (to eliminate

nonessential positions without sacrificing customer service or revenue). The Tenth Circuit recognized the significance of this distinction and pointed to ANR's evidence of specific reasons for eliminating Morgan's position and transferring his duties to the manager of the Cherryvale terminal. Petitioner's Appendix at B-17.

Morgan's argument on this point also fails because he demonstrated no correlation between age and salary; instead, Morgan simply assumed such correlation. In fact, the evidence here demonstrated that of the four terminal managers terminated in the Kansas City Region in February, 1986, Morgan was the oldest but was the third highest paid. In addition, Morgan's argument cannot be reconciled with the fact that ANR also eliminated low-paying positions such as clerks and cashiers.

It is Morgan's claim rather than the Tenth Circuit's decision which runs contrary to the policies of ADEA. The Tenth Circuit correctly observed that Morgan's "arguments, if taken to their logical conclusion, would require an employer to grant preferential treatment to its employees within the protected age group. Such a result was not intended by the ADEA." Petitioner's Appendix at B-25. *Accord Branson*, 853 F.2d at 772; *Sperry Corp.*, 852 F.2d at 509; *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); *Williams v. General Motors Corp.*, 656 F.2d 120, 129-30 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). In short, ADEA does not alter the fundamental economics of the marketplace; indeed, "an ADEA plaintiff who has been terminated amidst a corporate reorganization carries a greater burden of supporting charges of discrimination than an employee who

was not terminated for similar reasons." *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986). With two courts having found that Morgan failed to carry his burden of proof, this case should now come to an end.

CONCLUSION

Morgan has failed to demonstrate any sufficient grounds for the issuance of a writ of certiorari consistent with the factors set forth in Supreme Court Rule 10. There is no conflict among the circuits, and the Tenth Circuit decided this case in accordance with established substantive principles of law under ADEA and in accordance with appropriate summary judgment procedures. Two courts have reviewed the record and have concluded that this is an insubstantial case which fails to raise a triable issue of age discrimination. Under these circumstances, summary judgment was the appropriate remedy:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). To prolong this action by granting a writ of certiorari would waste the resources of this Court and would run contrary to the goal of "just, speedy and inexpensive determination of every action."

Accordingly, Respondent ANR Freight System, Inc. requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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